Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GERIJO, INC.,

Petitioner,

v.

CITY OF FAIRFIELD, OHIO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

HARRY J. FINKE IV
GRAYDON, HEAD & RITCHEY
1900 Fifth Third Center
511 Walnut Street
P.O. Box 6464
Cincinnati, Ohio 45201
(513) 621-6464
Attorney for Petitioner
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

85 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the application and enforcement of a municipal zoning ordinance which does not advance a legitimate governmental interest violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

II.

Whether the application and enforcement of a municipal zoning ordinance which does not advance a legitimate governmental interest constitutes a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

Whether a property owner is denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the application and enforcement of a municipal zoning ordinance which does not advance a legitimate governmental interest.

IV.

Whether the evidence in this case established that the application of the municipal zoning ordinance at issue to Petitioner's property did not advance a legitimate governmental interest.

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1 R.M. Anderson, *American Law of Zoning 3d* (1986) 13, 16

REFERENCE TO THE REPORTS OF OPINIONS

Unpublished Opinion of the Court of Common Pleas, Butler County, Ohio, filed January 8, 1991 (Appendix ("App.") 42). Unpublished Memorandum Decision and Judgment Entry of the Court of Appeals, Twelfth Appellate District of Ohio, dated December 2, 1991 (App. 34). Unpublished Entry of the Supreme Court of Ohio dated May 13, 1992 (App. 33). Unpublished Judgment Entry of the Court of Common Pleas, Butler County, Ohio, filed June 2, 1992 (App. 31). Unpublished Memorandum Decision and Judgment Entry of the Court of Appeals, Twelfth Appellate District of Ohio, dated April 26, 1993 (App. 22). Unpublished Entry of the Court of Appeals of Butler County, Ohio (Twelfth Appellate District) Granting Motion to Certify, filed June 29, 1993 (App. 20). Unpublished Entry of the Supreme Court of Ohio dated August 25, 1993, denying motion to dismiss of Gerijo, Inc., and granting motion to consolidate of City of Fairfield, Ohio (App. 19). Unpublished Entry of the Supreme Court of Ohio dated September 29, 1993, overruling motion for an order directing the Court of Appeals for Butler County, Ohio, to certify its record (App. 18). *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 638 N.E.2d 533 (1994) (App. 1).

GROUNDS FOR JURISDICTION

(i) The decision of the Supreme Court of Ohio was filed September 14, 1994.

(ii) Not applicable.

(iii) Not applicable.

(iv) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

CONSTITUTIONAL PROVISIONS

Amendment V, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, § 1, Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 1, Ohio Constitution

Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Article I, § 16, Ohio Constitution

Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article I, § 19, Ohio Constitution

Inviolability of private property.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money,

or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

ORDINANCES

Chapter 1169 (M-1 Industrial Park District)

City of Fairfield Planning & Zoning Codes (1990)

(EXCERPTS)

1169.01 PRINCIPAL PERMITTED USES.

No building, structure, or land shall be erected, altered, enlarged or used which is arranged or designed for other than one of the following uses except as provided in Chapter 1198.

(a) *Warehousing Storage and Trucking Terminal.* Warehouses for the storage of merchandise and materials, trucking or motor freight stations or terminals, carting, expressing or hauling establishments, contractor and building material yards, providing no such uses are conducted within 200 feet of any A or R District.

(b) *Laboratory.* Experimental film or testing laboratories, provided no operation shall be conducted or equipment used which would create hazards, noxious or offensive conditions.

(c) *Manufacturing.* The manufacturing, compounding, processing, packaging and assembling of products, such as:

(1) Bakery goods, candy, cosmetics, pharmaceuticals, toiletries, food and meat

products, except fish, sauerkraut, vinegar, yeast and the rendering or refining of fats or oils.

(2) Products from the following previously prepared materials: bone, canvas, cellophane, cloth, cork, feathers, fibre, fur, glass, hair, horn, leather, paper, plastics, precious or semiprecious metals or stones, sheet metal, except where presses over twenty tons rated capacity are employed, shell, textiles, tobacco, wax, wood, except where saw and planing mills are employed, yarns.

(3) Musical instruments, toys, novelties, rubber or metal stamps and other small rubber products.

(4) Electrical and electric appliances, instruments and devices, television sets, radios, phonographs.

(5) Electric and neon signs, billboards and other commercial advertising structures; light sheet metal products, including heating and ventilating equipment, cornices, eaves and the like.

(d) *Public Utility.* Public utility buildings and structures, including storage yards.

(Ord. 94-84. Passed 7-9-84).

1169.02 CONDITIONAL USES.

The following uses shall be permitted only if expressly authorized by the Planning Commission.

(a) *Foundry.* Casting of lightweight nonferrous metals for electric foundry not causing noxious or offensive conditions.

(b) *Heliport.* As restricted by the Federal Aviation Authority.

(c) *Retail and Service.* Any retail business or service establishment determined by the Commission to have been clearly demonstrated as necessary to serve the needs of the industrial park area, including restaurants, cocktail lounges, motels, banks and business or professional offices.

(Ord. 94-84. Passed 7-9-84.)

STATEMENT OF THE CASE

This case arose when Respondent City of Fairfield, Ohio, ("Fairfield") denied the Petition for a Zone Change filed by Petitioner Gerijo, Inc., ("Gerijo") on April 24, 1989. In its petition, Gerijo sought to change the zoning classification of certain property it owned within Fairfield's city limits from M-1 (Industrial Park District) to R-3 (Multi-Family Residence District).

After Fairfield denied Gerijo's petition, Gerijo commenced an action in the Court of Common Pleas, Butler County, Ohio, seeking a declaratory judgment that the M-1 zoning classification, as applied to Gerijo's property, was arbitrary, unreasonable and capricious, in violation of Article I, §§ 1 and 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States. *See* Complaint, App. 58, at App. 60.

The action was tried to the bench on December 17, 1990. On February 6, 1991, the Court of Common Pleas issued an Entry of Judgment, App. 41, incorporating by reference an Opinion filed January 8, 1991, App. 42, dismissing Gerijo's complaint on the grounds that the case was not ripe for decision. However, in its Opinion, the trial court also addressed the merits of Gerijo's complaint, opining that Fairfield's M-1 zoning classification, as applied to Gerijo's property, was unconstitutional. *Gerijo, Inc. v. Fairfield*, No. CV89-09-1271, slip op. (Butler Cty. Common Pleas, January 8, 1991) (unreported) ("Opinion"), App. 42 at App. 51-57.

The Court of Common Pleas based its decision on evidence presented at trial that, given the topography of the property, the fact that it was surrounded on three sides by residential districts (and on the fourth by vacant land), the fact that there was not a single developed M-1 District next to a residential zone in the entire City of Fairfield, and the fact that Fairfield's stated reasons for imposing M-1 zoning restrictions on Gerijo's property were belied by the City's actions, the zoning ordinance as applied to Gerijo's property did not substantially advance Fairfield's legitimate interests in the health, safety or welfare of the community. *Id.* at App. 52-57. The court, therefore, found the ordinance unconstitutional as applied, despite the fact that it did not deprive Gerijo of all economically viable uses of its property. *See id.* at App. 51-53.

Gerijo perfected an appeal to the Ohio Twelfth District Court of Appeals, which reversed the trial court's dismissal of the action and remanded the case for further

proceedings. *See* December 2, 1991, Memorandum Decision and Judgment Entry, App. 34. Fairfield sought discretionary review of that decision in the Supreme Court of Ohio, but review was denied. *See* May 13, 1992, Entry, App. 33.

On remand, the trial court held, in conformity with its earlier Opinion, that the existing zoning of Gerijo's property was unconstitutional and gave Fairfield ninety days to rezone the property in a constitutional manner. *See* June 2, 1992, Judgment Entry, App. 31. Fairfield appealed to the Twelfth District Court of Appeals and sought and obtained a stay of the trial court's judgment.

On April 26, 1993, the Twelfth District Court of Appeals issued its Memorandum Decision and Judgment Entry, App. 22, affirming the trial court's decision. The court of appeals specifically "examine[d] the trial court's conclusion that the zoning ordinance did not advance a legitimate interest in the health, safety, or welfare of the community," *Gerijo, Inc. v. Fairfield*, No. CA92-07-116, slip op. (Butler Cty. App. April 26, 1993) (unreported), App. 22 at App. 28, and agreed that Fairfield's M-1 zoning, as applied to Gerijo's property, "served no legitimate goal." *Id.* at App. 30. The court of appeals, following its own precedent and agreeing with the trial court, also explicitly held that Gerijo need prove no more in order to attack successfully the zoning ordinance on constitutional grounds. *Id.* at App. 27.

Fairfield sought discretionary review of the Twelfth District Court of Appeals' decision in the Supreme Court of Ohio. Fairfield also filed a motion seeking to have the Twelfth District Court of Appeals certify the case for

review, on the grounds that the Twelfth District's decision, that in order to invalidate the application of a zoning regulation on constitutional grounds, a property owner need only prove that such application did not advance legitimate governmental interests, was in conflict with a decision of Ohio's Eleventh District Court of Appeals. The Twelfth District granted Fairfield's motion to certify on June 29, 1993. *See* Entry Granting Motion to Certify, App. 20.

The Supreme Court of Ohio consolidated the discretionary appeal with the appeal certified by the Twelfth District. *See* August 25, 1993, Entry, App. 19. It thereafter declined to entertain the discretionary appeal but heard the case on certification from the Twelfth District Court of Appeals. *See* September 29, 1993, Entry, App. 18.

The parties briefed and argued the case before the Supreme Court of Ohio. On September 14, 1994, that court issued its opinion. *Gerijo, supra,* 70 Ohio St.3d 223, 638 N.E.2d 533 (1994).

The Supreme Court of Ohio – by the barest of majorities – held that, in order to attack successfully the constitutionality of a municipal zoning ordinance, a property owner must prove *both* that the ordinance deprives him or her of an economically viable use of the subject property *and* that the ordinance fails to advance a legitimate governmental interest. *Id.,* syllabus.[1]

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[1] The syllabus reads, in its entirety, as follows: "A party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that

The court rejected Gerijo's argument that a zoning ordinance which does not advance a legitimate governmental interest is unconstitutional, regardless of whether it deprives the property owner of an economically viable use. *See id.*, 70 Ohio St.3d at 227, 638 N.E.2d at 537.

Gerijo now seeks review of that decision in this Court.

STAGE AT WHICH FEDERAL QUESTION WAS RAISED IN STATE COURT PROCEEDINGS

The federal constitutional issue was raised in Gerijo's Complaint, filed September 8, 1989. *See* Complaint, App. 58 at App. 60. Although the Supreme Court of Ohio's syllabus does not explicitly refer to either state or federal constitutional provisions,[2] an analysis of the opinion makes clear that the Supreme Court of Ohio considered and rejected Gerijo's federal constitutional claim.

In its opinion, the Supreme Court of Ohio repeatedly cited this Court's decisions defining the legitimate use of a municipality's police power. *See Gerijo, supra*, 70 Ohio St.3d at 226, 227, 230, 638 N.E.2d at 536, 537, 539.

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it fails to advance a legitimate governmental interest." *Gerijo, supra*, syllabus.

[2] Under Ohio law, the Supreme Court of Ohio's opinion syllabus states the rule of law used to decide the case. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565 (1977) (and cases cited therein).

Furthermore, Justice Pfeifer's dissenting opinion, joined by Justices A.W. Sweeney and Wright, was explicitly founded on the conflict between the majority's holding and this Court's decision in *Agins v. Tiburon*, 447 U.S. 255 (1980), *see Gerijo, supra*, 70 Ohio St.3d at 231-232, 638 N.E.2d at 540 (Pfeifer, J., dissenting), thus establishing that the majority, in rejecting the dissenters' position, necessarily considered and rejected the teachings of *Agins*.

Finally, to the extent the Supreme Court of Ohio rejected Gerijo's position as a matter of *state* constitutional law, it could only have reached that decision because it "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini, supra* n.2, 433 U.S. at 568.

The Supreme Court of Ohio has determined that Article I, § 19 of the Ohio Constitution and related provisions in Article I, §§ 1 and 16 are equivalent to and run parallel with the guarantees safeguarded under the Fourteenth Amendment, *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 8, 399 N.E.2d 66, 67 (1980); *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544-45, 38 N.E.2d 70, 72-73 (1941), and has looked to this Court's Takings-Clause jurisprudence to construe Article I, § 19 of the state constitution. *See State ex rel. Royal v. Columbus*, 3 Ohio St.2d 154, 157, 209 N.E.2d 405, 408 (1965).

Similarly, the Supreme Court of Ohio has consistently construed the state "due course of law" provision, *see* Ohio Constitution, Article I, § 16, to be "the equivalent of the 'due process of law' provision in the Fourteenth

Amendment to the United States Constitution.' " *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422-23, 633 N.E.2d 504, 511 (1994). *See also Euclid v. Ambler Realty Co.*, 272 U.S. 359, 386 (1926) ("It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions . . . ").

Under those circumstances, this Court has found the federal constitutional issue to have been properly raised and considered in the state courts. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984); *Michigan v. Long*, 463 U.S. 1032, 1042-43 n.8 (1983); *Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979); *Zacchini, supra*, at 568. *See also Staub v. Baxley*, 355 U.S. 313, 318-19 (1958); *Raley v. Ohio*, 360 U.S. 423, 434-37 (1959).

ARGUMENT

I. INTRODUCTION

The Supreme Court of Ohio's decision contravenes the most basic guarantees of due process of law under the Fourteenth Amendment to the United States Constitution, violates the Takings Clause of the Fifth Amendment to the United States Constitution and ignores fundamental precepts of zoning law based on those Amendments. For the reasons which follow, Gerijo respectfully requests that this Court grant its petition and reverse that decision.

II. THE APPLICATION AND ENFORCEMENT OF A ZONING ORDINANCE WHICH DOES NOT ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Zoning, by its nature, restricts the uses to which a landowner can put his or her property. 1 R.M. Anderson, *American Law of Zoning 3d* at § 1.13 (1986). The restriction is, however, justified and legitimized as an exercise of the government's police power when – but only when – the zoning ordinance advances the government's legitimate interests in the health, safety or welfare of the community. The application of Fairfield's M-1 zoning ordinance to Gerijo's property fails to advance those interests.

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In its Takings-Clause jurisprudence, this Court has consistently recognized that a property restriction which does not substantially advance a legitimate state interest constitutes an unlawful taking without just compensation, in violation of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment. *Dolan v. Tigard*, ___ U.S. ___, ___, 114 S.Ct. 2309, 2316 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' "); *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S.Ct. 2886, 2893-94 (1992) ("As we have said on numerous occasions, the

Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' ") (italics omitted); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land' . . . '[A] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose.' ") (citations omitted); *Agins, supra*, 447 U.S. at 260 ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land.") (citations omitted) (emphasis added).

As noted by the dissent in the Supreme Court of Ohio, *see Gerijo, supra*, 70 Ohio St.3d at 231, 638 N.E.2d at 540 (Pfeiffer, J., dissenting), this Court's admonition in *Agins*, quoted above, is directly contravened by the *Gerijo* syllabus. The *Gerijo* majority's construction of Ohio law allows the application and enforcement of a zoning restriction which does not substantially advance a legitimate governmental interest, so long as the restriction does not completely deny the property owner all economically viable use of his or her property. That holding runs directly contrary to the Takings Clause of the Fifth Amendment, yet it will remain the law of Ohio unless the Supreme Court of Ohio's decision is reversed by this Court.

III. A PROPERTY OWNER IS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE APPLICATION AND ENFORCEMENT OF ZONING RESTRICTIONS WHICH DO NOT ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST.

The Fourteenth Amendment prohibits the State from "depriv[ing] any person of . . . property, without due process of law." U.S. Const. amend. XIV. The Supreme Court of Ohio's holding violates those principles.[3]

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relationship to the public health, safety, morals, or general welfare." *Nectow v. Cambridge*, *supra* n.3, 277 U.S. at 188.

Zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." *Euclid*, *supra*, 272 U.S. at 387. Zoning regulations

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[3] It is not clear whether the standards applied by this Court in analyzing property-use restrictions in a due process context are different from those applied in a takings context. *See Nollan*, *supra*, 483 U.S. at 834-35 n. 3 (suggesting that standards may be different). *But see Agins*, *supra*, 447 U.S. at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183 (1928), a due process case, *see id.* at 185, in the context of a takings analysis).

which do not bear a substantial relationship to legitimate governmental interests deny the property owner his or her rights under the Due Process Clause. *Roberge, supra,* 278 U.S. at 122-23; *Nectow, supra,* 277 U.S. at 188-89. *See also Euclid, supra.*

The standard established by the Supreme Court of Ohio in *Gerijo* deprives Gerijo, and all other similarly-situated property owners in the State of Ohio, of their due process rights. An Ohio property owner challenging the constitutionality of a zoning ordinance as applied to his or her property cannot now succeed by establishing that the ordinance is not related to legitimate governmental interests. Regardless of how arbitrary or capricious the application of the ordinance might be, the application of the ordinance would withstand attack provided the property owner were not deprived of all economic use of his or her property. Such a result is anathema to long-established principles of due process. *Nectow, supra.*

One leading commentator has observed, "If the objective of the ordinance is beyond the reach of the police power, the ordinance is unconstitutional even though the injury to the subject property is minute." Anderson, *American Law of Zoning 3d, supra,* at § 3.24. That observation is a correct summary of this Court's decisions. Unfortunately, since *Gerijo,* it is not a correct statement of Ohio law.

IV. THE EVIDENCE IN THIS CASE ESTABLISHED THAT THE APPLICATION OF THE ZONING REGULATION AT ISSUE TO GERIJO'S PROPERTY DOES NOT BEAR A SUBSTANTIAL RELATIONSHIP TO LEGITIMATE GOVERNMENTAL INTERESTS.

The Court of Common Pleas, sitting as the trier of fact, found from the evidence that Fairfield's M-1 zoning regulation, as applied to Gerijo's property, did not substantially advance Fairfield's legitimate governmental interests. *See* Opinion at App. 48, App. 53-57. *See also* June 2, 1992, Judgment Entry, App. 31-32.

The Twelfth District Court of Appeals, "guided by the principle that judgments supported by competent, credible evidence going to all essential elements of the case must not be reversed as being against the manifest weight of the evidence," *Gerijo, supra*, No. CA92-07-116 at App. 28, and further recognizing that "[e]very reasonable presumption must be made in favor of the judgment and findings of fact and, if the evidence is susceptible of more than one construction, [the court] must give it that interpretation which is most favorable to sustaining the trial court's verdict and judgment," *id.*, "confirm[ed]" the trial court's conclusions of fact, *id.* at App. 30, and affirmed its judgment. *Id.*

The Supreme Court of Ohio majority, while giving lip service to the settled principles recognized by the Court of Appeals, *see Gerijo, supra*, 70 Ohio St.3d at 226, 638 N.E.2d at 536-37, failed to put those principles into practice and, in effect, simply ignored the trial court's factual findings. *Id.*, 70 Ohio St.3d at 228-231, 638 N.E.2d at 537-39.

The dissent, however, correctly pointed out that "the evidence presented at trial supports the trial court's conclusion that the ordinance does not substantially advance a legitimate interest in health, safety or welfare of the community." *Id.*, 70 Ohio St.3d at 231-32, 638 N.E.2d at 540 (Pfeiffer, J., dissenting). Reviewing the pertinent facts in evidence, as reflected in the opinions of the Court of Common Pleas and the Twelfth District Court of Appeals, the dissent correctly categorized the ordinance as "arbitrary and indefensible." *Id.*, 70 Ohio St.3d at 232, 638 N.E.2d at 540.

The Court of Common Pleas, as the trier of fact, found that Fairfield's M-1 zoning regulation as applied to Gerijo's property was not substantially related to a legitimate governmental interest. According those findings the deference they are due, *see C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978) (syllabus); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984); *Ross v. Ross*, 64 Ohio St.2d 203, 414 N.E.2d 426 (1980), the Court of Appeals and the three dissenting justices in the Supreme Court of Ohio agreed with the trial court. A review of the trial court's opinion indicates that those seven jurists were correct, and the four justices in the *Gerijo* majority erred. The application of Fairfield's M-1 zoning regulation to Fairfield's property is not substantially related to a legitimate governmental interest and is, therefore, unconstitutional.

CONCLUSION

The Supreme Court of Ohio's decision in *Gerijo* establishes a rule of law which deprives Gerijo of its rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Unless that decision is reversed by this Court, all similarly situated property owners in the State of Ohio will suffer a similar deprivation. Petitioner Gerijo, Inc., respectfully requests, therefore, that the Court grant its Petition for a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

HARRY J. FINKE IV
GRAYDON, HEAD & RITCHEY
1900 Fifth Third Center
511 Walnut Street
P. O. Box 6464
Cincinnati, Ohio 45201
(513) 621-6464
Attorney for Petitioner
Counsel of Record

GERIJO, INC., APPELLEE, *v.* CITY OF FAIRFIELD, APPELLANT.

[Cite as *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223.]

Municipal corporations – Zoning – Elements party who attacks municipal zoning ordinance on constitutional grounds must prove.

A party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest.

See: West's Ohio Digest, Zoning and Planning – 40.

CERTIFIED by the Court of Appeals for Butler County, No. CA92-07-116.

(Nos. 93-1300 and 93-1434 – Submitted April 26, 1994 – Decided September 14, 1994.)

Plaintiff-appellee Gerijo, Inc. ("Gerijo") is an Ohio corporation owned by members of the Oliver family. The Olivers, either individually or through the corporation, have owned the property at issue in this appeal since the 1870s. The subject property consists of approximately thirty-seven acres situated one thousand feet southwest of State Route 4 in Fairfield, Ohio.

In 1979, defendant-appellant city of Fairfield adopted a comprehensive land use plan ("the 1979 Plan") in response to the rapid population growth the city had experienced during the preceding two decades. The city devoted one section of the 1979 Plan to the perceived need for land use management as a means to foster relationships among the residential, commercial and industrial segments of the city. One objective articulated

in the land use section was to create a housing mix of seventy percent owner-occupied and thirty percent renter-occupied dwellings. In 1986, the Fairfield City Council passed a resolution retaining this ratio but specifying that the owner-occupied units must be single-family homes. Thereafter in 1989, Fairfield adopted a revised land use plan ("the 1989 Plan") in which it again stated the city's desire for a seventy-thirty ratio between single-family and multifamily dwellings. The 1989 Plan also included an intent to confine all industrial development to the areas east of State Route 4.

Throughout most of the last century, the Olivers and/or Gerijo farmed the land at issue in this case. Approximately ten years ago, however, the property ceased to be used as a farm and has since remained vacant. In its current state, the Gerijo property is an undeveloped area surrounded on three sides by multifamily residential developments. The fourth side, lying to the north and northwest of the subject property, is zoned for commercial uses. While the subject parcel was once zoned as a multifamily residential area, the city of Fairfield rezoned the area in 1989 as M-1, an Industrial Park District. According to Chapter 1169 of the Fairfield Planning and Zoning Codes ("the zoning code"), M-1 is a light industrial district reserved for particular uses including warehouse storage, trucking terminals, laboratories, product manufacturers, and public utilities. Those uses are further limited by certain conditions and

prohibitions outlined in the zoning code.[1] In the 1989 Plan, the city defined "light industrial" areas as those "located in the most visible industrial portion of the city. The purpose here is to attract less environmentally disruptive development that typically includes high growth and high tech type industries. [T]his type [of] development is the key to the City's economic and tax base. * * * "

In recent years, the Oliver family had received several offers from prospective buyers who were interested in developing the subject property. Most of the solicitations proposed multifamily developments similar to those located on surrounding properties and included offers ranging from $30,000 to $70,000 per acre. Gerijo also received one offer for $40,000 per acre to develop the

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[1] Section 1169.04 of the zoning code, entitled "Required Conditions," states:

> "Processes and equipment employed in goods processed or sold shall be limited to those which are not objectionable by reason of odor, dust, smoke, cinders, gas, fumes, noise, vibration, refuse matter or water carried waste."

Section 1169.05 sets out "Prohibited Uses." Subsection (B) states:

> "No use shall be permitted or authorized to be established or maintained which, when conducted under adequate conditions and safeguards, in compliance with the provisions of the Zoning Ordinance and any additional conditions or requirements prescribed by the Planning Commission is, or may become, hazardous, noxious or offensive due to the emission of odor, dust, smoke, cinders, gas, fumes, noise, vibration, beat frequency, refuse matter or water carried waste."

property under the existing light industrial zoning classification.

On April 24, 1989, Gerijo filed a petition with the Fairfield City Council requesting that the subject property be rezoned from M-1 light industrial to R-3 multifamily residential. Gerijo sought the reclassification so that it could pursue an offer extended by Trammell Crow Residential Corporation to develop five hundred thirty-two multifamily units on the subject property at a price of $65,000 per acre. At the time Gerijo filed its petition, Fairfield housing reflected a fifty-fifty ratio of single-family to multifamily units. Approval of the rezoning and subsequent development of the five hundred thirty-two units would have altered the housing ratio to roughly forty-eight to fifty-two in favor of multifamily units. On August 14, 1989, the Fairfield City Council rejected Gerijo's application.

Once the city denied its request to rezone the property, Gerijo filed a complaint with the Court of Common Pleas of Butler County challenging the constitutionality of the M-1 zoning scheme as it related to the subject parcel. Gerijo argued the M-1 zoning prevented "the highest and best use of the Property, and it is arbitrary, confiscatory, unreasonable, and not based on the public health, safety, moral[s] and general welfare." While finding that Gerijo failed to prove the M-1 zoning was confiscatory, the trial court ultimately invalidated the classification on the grounds that it failed to substantially advance a legitimate governmental interest. The court of appeals affirmed.

The appellate court, finding its judgment to be in conflict with the judgment of the Court of Appeals for Lake County in *Diversified Constr., Inc. v. Willoughby Hills* (Dec. 4, 1992), Lake App. No. 91-L-145, unreported, 1992 WL 361445, certified the record of the cause to this court for review and final determination.

Graydon, Head & Ritchey, Anthony G. Covatta and *Harry J. Finke IV,* for appellee.

Manley, Burke, Fischer & Lipton, Timothy M. Burke and *Gary E. Powell; Millikin & Fitton* and *John H. Clemmons,* City Law Director, for appellant.

ALICE ROBIE RESNICK, J. In *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, 564 N.E.2d 455, this court held that in order to invalidate a zoning ordinance on constitutional grounds, the party attacking the regulation must establish, beyond fair debate, that the zoning classification denies him or her an economically viable use of the zoned property without substantially advancing a legitimate interest in the health, safety or welfare of the community. The question certified for our review is whether the two elements of this test must be proven in the conjunctive or the disjunctive. For the reasons which follow, we find that a plaintiff must prove both prongs in order to invalidate a zoning ordinance. The decision of the court of appeals is therefore reversed.

The authority vested in municipalities to enact zoning ordinances is clearly defined in this state. R.C. 713.06 permits Ohio cities such as Fairfield to "frame and adopt

a plan for dividing the municipal corporation or any portion thereof into zones or districts, representing the recommendations of the [municipality's planning] commission, in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare * * * ." In addition, the Ohio Constitution explicitly subjects the right of an individual to use and enjoy his or her property to the legitimate exercise of local police power. See Section 3, Article XVIII. Inasmuch as the exercise of police power interferes with individual rights, the use of such power must bear a substantial relationship to a legitimate government interest and must not be unreasonable or arbitrary. *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 9 OBR 273, 458 N.E.2d 852; *Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 26 O.O. 116, 118, 49 N.E.2d 412, 414. We acknowledged, however, that the line separating the legitimate use of police power from the illegitimate is often incapable of precise delimitation, as it varies from circumstance to circumstance. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303, 310.

When reviewing the legitimacy of zoning ordinances, this court has repeatedly recognized a strong presumption in favor of the validity of an enactment. *Hudson, supra*, 9 Ohio St.3d at 71, 9 OBR at 275, 458 N.E.2d at 855; *Downing v. Cook* (1982), 69 Ohio St.2d 149, 151, 23 O.O.3d 186, 187, 431 N.E.2d 995, 997; *Brown v. Cleveland* (1981), 66 Ohio St.2d 93, 95, 20 O.O.3d 88, 89, 420 N.E.2d 103, 105. The party challenging an ordinance bears, at all stages of the proceedings, the burden of demonstrating that the provision is unconstitutional. *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St.3d 239, 557 N.E.2d 779; *Mayfield-Dorsh,*

Inc. v. S. Euclid (1981), 68 Ohio St.2d 156, 157, 22 O.O.3d 388, 388, 429 N.E.2d 159, 160; *Hilton v. Toledo* (1980), 62 Ohio St.2d 394, 396, 16 O.O.3d 430, 431, 405 N.E.2d 1047, 1049. As this court discussed in *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 26 O.O.2d 249, 251, 197 N.E.2d 201, 204, a court's authority in determining the validity of zoning regulations is limited in that "the court can not usurp the legislative function by substituting its judgment for that of the council. Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts." See, also, *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 142, 75 O.O.2d 190, 193, 346 N.E.2d 666, 669; *Allion v. Toledo* (1919), 99 Ohio St. 416, 420, 124 N.E. 237, 238. A court may substitute its judgment for that of the local governing body only when a municipality exercises its zoning power in an arbitrary, confiscatory or unreasonable manner which violates constitutional guaranties. *Willott, supra,* at paragraph three of the syllabus.

In our examination of the trial court's decision to invalidate Fairfield's zoning ordinance, we are necessarily constrained by the principle that judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed, as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. We must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273. In the event the evidence is susceptible to more than one interpretation, we must construe it consistently

with the lower court's judgment. See *Ross v. Ross* (1980), 64 Ohio St.2d 203, 18 O.O.3d 414, 414 N.E.2d 426.

In considering the case at bar, our focus rests upon the well-established standard of review that where a property owner challenges the constitutionality of a municipal zoning ordinance, that party must demonstrate, beyond fair debate, the zoning classification denies him or her an economically viable use of the zoned land without substantially advancing a legitimate interest in the health, safety, or welfare of the community. *Columbia Oldsmobile, Inc. v. Montgomery, supra,* 56 Ohio St.3d 60, 564 N.E.2d 455; *Ketchel v. Bainbridge Twp., supra,* 52 Ohio St.3d at 245, 557 N.E.2d at 783; *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350, 1357; *Mayfield-Dorsh, Inc. v. S. Euclid, supra,* 68 Ohio St.2d 156, 22 O.O.3d 388, 429 N.E.2d 159; *Superior Uptown, Inc. v. Cleveland* (1974), 39 Ohio St.2d 36, 68 O.O.2d 21, 313 N.E.2d 820. See, also, *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 127, 98 S.Ct. 2646, 2661, 57 L.Ed.2d 631, 650; *Goldblatt v. Hempstead* (1962), 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 395, 47 S.Ct. at 121, 71 L.Ed. at 314. We are essentially being asked to clarify whether the phrase beginning with the word "without" constitutes a second element which must be proved or merely an alternative element which may, by itself, support a finding of unconstitutionality. Both the trial court and the court of appeals concluded Gerijo need only prove one of the two prongs in order to succeed in its challenge of the M-1 light industrial classification. As a result, even though Gerijo could not establish that the zoning scheme denied it a reasonable economic use of the subject property, the lower courts invalidated

the Fairfield zoning ordinance upon the sole basis that the scheme failed to advance a legitimate government interest.

The lower courts' decisions effectively ignore and consequently delete the "economic viability" prong from the established standard of review. As we stated in *Columbia Oldsmobile*, "we must employ a *two-part* analysis to pass on the constitutional validity of a zoning ordinance." (Emphasis added.) *Id.*, 56 Ohio St.3d at 62, 564 N.E.2d at 457. Had we intended for evidence of one element to qualify as sufficient proof to invalidate a municipal enactment, there would have been no need to state the second. By repeatedly setting out both economic viability and the advancement of a legitimate governmental interest as two steps of the same test, we intended to require that a challenging party prove each element.

Gerijo contends, however, our actions in the *Columbia Oldsmobile* decision speak louder than our words. In the first part of the opinion, we determined that the zoning ordinance at issue did not deprive the landowner of an economically viable use. Thereafter, we proceeded to examine whether the legislation advanced a legitimate governmental interest. Gerijo asserts that if this court had intended for the two prongs to be applied conjunctively, our review would have ceased once we concluded the challenging party failed to establish deprivation of economic viability. Gerijo's argument qualifies as the proverbial attempt to make something out of nothing. Our discussion of each element represents nothing more than a thorough application of the test we adopted. In recognition of the accepted principle that legislative bodies are vested with the discretion and authority to create land

use policies, one who challenges the legitimacy of a zoning enactment must satisfy a substantial burden of proof in order to prevail. We, therefore, hold that a party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest.

Applying the foregoing two-prong test to this case, we begin with the issue of economic viability. Generally, a zoning ordinance is not confiscatory so long as the owner is not deprived of the reasonable use of his or her property. *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St.3d 184, 527 N.E.2d 825. When, however, a zoning ordinance denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances, it is impermissibly restrictive. *Id.* at 186, 527 N.E.2d at 827.

The trial court determined that the Fairfield ordinance did not deprive Gerijo of an economically feasible utilization of its land given the outstanding offer to purchase the property, along with some additional acreage, for $40,000 per acre under the current light industrial zoning classification. In comparing the $40,000 offer with the Trammell Crow offer of $65,000 per acre for a multifamily development, the trial court concluded that "[w]hile this difference in value is disheartening, we do not believe that it is confiscatory." The mere fact that property is not zoned for its highest value and best use does not alone invalidate a zoning ordinance. *Ketchel v. Bainbridge Twp., supra,* 52 Ohio St.3d at 243, 557 N.E.2d at 783; *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38

Ohio St.2d 298, 67 O.O.2d 358, 313 N.E.2d 400. Despite Gerijo's arguments in the trial court concerning the confiscatory impact of the zoning ordinance, Gerijo candidly admitted during oral argument before this court that it had not been deprived of the reasonable economic use of its property. Based upon the foregoing, Gerijo clearly failed to satisfy one of the requisite elements for invalidating Fairfield's zoning enactment.

Continuing our analysis under the *Columbia Oldsmobile* test, we next consider whether the zoning ordinance substantially advances Fairfield's legitimate interest in the health, safety or welfare of the community. Where a municipality makes a determination as to what is beneficial or detrimental to community planning, including the development of land use policies, that decision is first and foremost a legislative matter. *Willott, supra,* 175 Ohio St. at 560, 26 O.O.2d at 251, 197 N.E.2d at 204. A city may properly exercise its zoning authority in an attempt to preserve and protect the character of designated areas in order to promote the overall quality of life within the city's boundaries. *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 33, 30 OBR 33, 37, 505 N.E.2d 966, 971; *Hudson v. Albrecht, Inc., supra,* 9 Ohio St.3d 69, 9 OBR 273, 458 N.E.2d 852. The judgment of the judiciary is not to be substituted for that of the legislature when an issue is fairly debatable so that reasonable minds may differ. *Willott, supra,* 175 Ohio St. at 560, 26 O.O.2d at 251, 197 N.E.2d at 204; *Euclid, supra,* 272 U.S. at 388, 47 S.Ct. at 118; 71 L.Ed. at 311.

The evidence presented on behalf of the city of Fairfield indicates the city rezoned Gerijo's property from residential to light industrial in an attempt to provide a

buffer between the multifamily residential and commercial sections which surround the subject parcel. The Fairfield Planning Director testified that from the time the 1979 Plan was adopted to 1989, when the city rezoned the Gerijo property, the city experienced numerous problems with multifamily dwellings located directly adjacent to retail and commercial uses. Residents living in the area immediately surrounding the subject parcel had complained to city officials about excessive noise and traffic problems stemming from nearby commercial establishments, which interfered with the inhabitants' enjoyment of residential life.[2] By rezoning Gerijo's property for use as a buffer, the city was simply responding to the existing clash between the residential and commercial segments. One of Fairfield's experts testified, "while one would not normally think of M1 [light industrial] as a transition zone, I think in terms of land uses, a reasonable person would recognize, from my land use experience, I recognize the need for transitional use between the retail fronting on State Route Four and the residential property * * * . [The light industrial zone] does, indeed, provide that needed transition * * * and needed buffering * * * ."

At the conclusion of its review of the evidence, the trial court found that "it [is] axiomatic that all other

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[2] The record reveals numerous citizen complaints filed with the Fairfield City Council and/or Mayor protesting the noise, traffic and general change in atmosphere created by the close proximity of commercial developments to the residential areas. Included within the record is a petition signed by more than fifty Fairfield residents who live in the area surrounding the Gerijo property asking the city council to take action in remedying these problems.

zoning classifications, other than M-1 and M-2 [industrial], would represent a far less severe contrast in adjacent zonings." We disagree. The city presented credible evidence to support the transitional use of a light industrial district. There was expert testimony from which the trial court could find that under a light industrial classification, the subject property could be developed into, among other things, a "high tech" industrial park which would have little impact on the environment and would likely operate only during normal business hours. The true range of industrial possibilities, however, is unknown since, as the trial court concluded, "the record is totally void of any evidence which suggests the efforts [by Gerijo] *to sell* the property as industrial." (Emphasis *sic.*) Nevertheless, all potential developments will necessarily be constrained by the prescribed list of permissible uses set forth in Chapter 1169 of the Fairfield Zoning Code. The city will also be able to control development of the parcel by virtue of Section 1169.05(b), which specifically prohibits any use which "is, or may become, hazardous, noxious or offensive due to the emission of odor, dust, smoke, cinders, gas, fumes, noise, vibration, beat frequency, refuse matter or water carried waste."

In support of its position that the city arbitrarily rezoned Gerijo's property, the trial court placed great emphasis on its conclusion that, in Fairfield, there was not a single developed M-1 district next to a residential zone. Placement of a light industrial area to the west of State Route 4 also conflicts with the city's express intent to confine all industrial development to the east side of Route 4. These issues, however, are not fatal to the city's actions. Fairfield's efforts in this case represent a sincere

attempt by the local governing body to respond to very specific land use problems that arose as the municipality expanded. Use of the light industrial classification as a transitional zone was specifically tailored to meet the needs of areas surrounding Gerijo's property. We will not substitute our opinion for the local zoning expertise of the legislative entity when the evidence presented clearly contradicts a finding that the M-1 zoning was arbitrary or that it failed to substantially advance a legitimate governmental interest.

Besides citing the need for a buffer between residential and commercial areas, the city denied Gerijo's proposed zoning change for the additional reason that it conflicted with the stated objective of achieving a seventy-thirty ratio between single-family and multifamily developments. Had the city approved Gerijo's request, the number of multifamily dwellings would have exceeded the number of single-family homes. Creating a goal and a zoning scheme that are both designed to preserve a balance between these types of residential uses represents a legitimate use of a municipality's police power. *Belle Terre v. Boraas* (1974), 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797; *Euclid, supra*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

The trial court labeled Fairfield's desired housing mix a "worthy objective" but then struck down the zoning classification as an attempt to "arbitrarily and capriciously 'zone out' multifamily units." Upon review of the record, we conclude that Fairfield was not attempting to arbitrarily banish multifamily dwellings, but rather was striving toward its stated goal of a balanced housing population. Contrary to the court of appeals' position, we

find nothing in the record to suggest that the city had deviated from this stated objective on prior occasions. As a result, the Fairfield City Council acted well within its scope of authority when it denied Gerijo's application for reclassification.

For the above stated reasons, we find that Gerijo failed to prove that the Fairfield zoning classification both denied Gerijo a reasonable economic use of its property and failed to advance a legitimate interest in the health, safety or welfare of the community. The record supports Fairfield's decision to zone the subject property as a light industrial district in order to serve as a buffer between residential and commercial segments of the city. The judgment of the court of appeals is therefore reversed.

Judgment reversed.

MOYER, C.J., DOUGLAS and F.E. SWEENEY, JJ., concur.

A.W. SWEENEY, WRIGHT and PFEIFER, JJ., dissent.

PFEIFER, J., dissenting. The majority uses an overly generous test to determine the constitutionality of the Fairfield zoning ordinance. When the correct analysis is applied, the ordinance fails to pass constitutional scrutiny.

I

Columbia Oldsmobile, Inc. v. Montgomery (1990), 56 Ohio St.3d 60, 564 N.E.2d 455, delineates the rule at issue in this case. In *Columbia Oldsmobile*, we held that " '[i]n order to invalidate a zoning regulation on constitutional grounds, the parties attacking it must demonstrate,

beyond fair debate, that the zoning classification denies them the economically viable use of their land *without* substantially advancing a legitimate interest in the health, safety, or welfare of the community. * * * ' " (Citations omitted and emphasis added.) *Id.* at 62, 564 N.E.2d at 457. The majority holds that the word "without" means "and." Thus, in order to invalidate a zoning ordinance on constitutional grounds a plaintiff must prove both elements of the test. It is hard to imagine a zoning scheme that would not pass the majority's conjunctive test. Fortunately, the United States Supreme Court has provided a test that provides affected landowners with refuge from unreasonable governmental action.

The United States Supreme Court in *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106, unanimously concluded that a disjunctive test should be used when scrutinizing a zoning ordinance. The *Agins* court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * , *or* denies an owner economically viable use of his land." (Citations omitted and emphasis added.) *Id.* at 260, 100 S.Ct. at 2141, 65 L.Ed.2d at 112.

In the present case, a disjunctive test should also be used.

II

In applying the disjunctive test used in *Agins* to the present case, we should conclude that the Fairfield zoning ordinance is unconstitutional because the evidence presented at trial supports the trial court's conclusion

that the ordinance does not substantially advance a legitimate interest in health, safety or welfare of the community.

The ordinance is arbitrary and indefensible. The city of Fairfield's 1979 land use plan confined all industrial zones to the east side of Route 4. At that time, Gerijo's land was zoned multifamily residential. In 1989, the city passed a new land use plan which designated Gerijo's property, which lies to the west of Route 4, as light industrial even though the surrounding area was residential. The residential districts in Fairfield shape a horseshoe enveloping Gerijo's property. The city alleges that the 1989 land use plan attempted to establish a ratio of seventy percent single-family residences to thirty percent multifamily residences. The zoning change of Gerijo's property from a multifamily designation to industrial designation purportedly facilitated this goal. As the trial court concluded, however, evidence at trial showed that Fairfield had permitted other multifamily residential projects since the land use plan was adopted. At trial, Fairfield's planning director testified that the current ratio of single-family to multifamily land use was closer to a fifty-fifty ratio. In sum, the city of Fairfield unfairly singles out the Gerijo property to be a victim of an arbitrary scheme.

The judgment of the court of appeals should be affirmed.

A.W. SWEENEY and WRIGHT, JJ., concur in the foregoing dissenting opinion.

THE SUPREME COURT OF OHIO

1993 TERM

To wit: September 29, 1993

Gerijo, Inc., Appellee,	:	
	:	Case No. 93-1300
v.	:	
	:	ENTRY
City of Fairfield, Ohio, Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Butler County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Manley, Burke, Fischer & Lipton.

(Court of Appeals Nos. CA9207116)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

To wit: August 25, 1993

Gerijo, Inc., Appellee,	:	Case No. 93-1434
v.	:	ENTRY
City of Fairfield, Ohio, Appellant.	:	

This cause is pending before the Court on the certification of conflict by the Court of Appeals for Butler County. Upon consideration of appellee's motion to dismiss and appellant's motion to consolidate the above-styled cause with Supreme Court Case No. 93-1300, *Gerijo, Inc. v. Fairfield,*

IT IS ORDERED by the Court that said motion to dismiss be be [sic], and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that said motion to consolidate be, and the same is hereby, granted.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF
BUTLER COUNTY, OHIO

GERIJO, INC.,	:	93-1434
Appellee,	:	Case No. CA92-07-116
vs.	:	ENTRY GRANTING MOTION TO CERTIFY
CITY OF FAIRFIELD, OHIO,	:	(Filed June 29, 1993)
Appellant.	:	

The above cause is before the court pursuant to a motion filed on May 7, 1993 by appellant, the city of Fairfield, requesting an order certifying this court's April 26, 1993 decision in the above-captioned case to the Supreme Court of Ohio on the basis that our holding conflicts with the case styled *Diversified Construction, Inc. v. City of Willoughby Hills* (Dec. 4, 1992), 1992 Ohio App. Lexis 6071. Counsel for appellee, Gerijo, Inc., filed a memorandum contra appellant's motion to certify on May 14, 1993.

Upon due consideration of the foregoing, we find that in the decision appellant seeks to certify we stated that the two prongs of the test set forth in *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, should be considered in the disjunctive. That is, in order to prove that a zoning ordinance is unconstitutional, the plaintiff must prove either that the zoning ordinance denies an economically feasible use of the property, or that the ordinance does not advance a legitimate government interest. In *Diversified Construction, supra,* the Ohio Eleventh District Court of Appeals held just the opposite

– that the two prongs are in the conjunctive and that the plaintiff must prove both prongs of the test to prevail.

According, appellant's motion to certify is GRANTED. The issue of law for certification is whether, in order to prove that the zoning ordinance is unconstitutional, the plaintiff must prove the two-pronged test set forth in *Columbia Oldsmobile, supra* in the conjunctive or in the disjunctive.

IT IS SO ORDERED.

/s/ Fred E. Jones
Fred E. Jones,
Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ William W. Young
William W. Young, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

GERIJO, INC.,	:	CASE NO. CA92-07-116
Plaintiff-Appellee,	:	
- vs -	:	MEMORANDUM DECISION AND JUDGMENT ENTRY
CITY OF FAIRFIELD,	:	
Defendant-Appellant.	:	4/26/93

Graydon, Head & Ritchey, Anthony G. Covatta and Harry J. Finke IV, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202, for plaintiff-appellee

Manley, Burke & Fischer, Timothy M. Burke and Gary E. Powell, 225 West Court Street, Cincinnati, Ohio 45202 and John H. Clemmons, Fairfield City Law Director, 18 Clock Tower Place, 1251 Nilles Road, Fairfield, Ohio 45014, for defendant-appellant

Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon the briefs and oral arguments of counsel. Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App.R. 12(A) as follows:

Defendant-appellant, city of Fairfield, appeals a decision of the Butler County Court of Common Pleas granting a request by plaintiff-appellee, Gerijo, Inc., ("Gerijo")

for a judgment declaring that the Fairfield Zoning Ordinance is unconstitutional as applied to a parcel of real estate owned by Gerijo.

The record reveals that Gerijo is a corporation formed by the members of the Oliver family, who have owned the real property in question since the 1870's. Until 1986, the property was a working farm. However, since 1986 the land has been vacant and the Oliver family has been attempting to sell it. The parcel of land consists of roughly thirty-eight acres which lie approximately one thousand feet behind the west side of Route 4 in Fairfield. The land slopes from both north to south and east to west, with several interspersed rises and falls. The property is currently zoned M-1, a low intensity industrial park zone. It is surrounded on three sides by multi-family residential districts. The real estate between this M-1 property and Route 4, which is also owned by Gerijo, is zoned C-3A, general business district, modified.

On April 24, 1989, Gerijo submitted a petition to the city of Fairfield for a zone change, seeking to have the property rezoned to R-3, a multi-family residence district. The city denied the petition. Consequently, on September 8, 1989, Gerijo filed a complaint for declaratory judgment in which it alleged that the city should not have denied its petition for a zone change because the zoning ordinance is unconstitutional as applied to the property. A hearing was held on September 17, 1990.

Richard Oliver, vice-president of Gerijo, testified that over the years Gerijo received various offers to purchase the property for multi-family developments similar to those on surrounding pieces of land. No buyer interested

in developing the property under the current light industrial zoning ever approached any representative of Gerijo. However, Gerijo did not list or attempt to sell the property under its existing industrial park zoning.

Oliver testified that Gerijo had received offers to purchase the property if rezoned to residential for as high as $70,000 per acre. The proposal which was pending at the time of the hearing was for $65,000 per acre. Experts for Gerijo testified that due to the rolling terrain, the property was unsuitable for industrial development. However, Gerijo did receive one unconditional offer for $40,000 per acre for the M-1 zoned property and the commercial zoned property combined.

Fairfield's 1979 Comprehensive Land Use Plan confined industrial zones to the east side of Route 4, the side opposite Gerijo's land, and zoned Gerijo's land multi-family residential. In 1989, the city passed a new land use plan which designated the property as light industrial. One objective of the 1989 plan was to establish a ratio of seventy percent single-family residences versus thirty percent multi-family residences. Timothy Bachman, Fairfield's Director of Planning, testified that the current ratio of single-family to multi-family was closer to fifty-fifty. Gerijo's proposed project, consisting of five hundred thirty-two units, would comprise three percent of the city's housing stock and push the single-family/multi-family ratio further from the city's seventy percent/thirty percent goal.

Bachman also testified that the city sought to use the M-1 district as a buffer between the commercially zoned property along Route 4 and the multi-family residential

zoned property behind Gerijo's property. He indicated that if Gerijo's property was zoned to multi-family residential it would be directly adjacent to a commercial zone. Bachman felt that the M-1 district would be "more of a day-time use," and would avoid "conflict points" that have arisen when multi-family residences are adjacent to retail or commercial zones. Bachman conceded, however, that permissible uses in the M-1 district could be controlled under provisions of the zoning code dealing with noise, light, and other problems. Bachman acknowledged the use of a M-1 zone as a buffer for a residential zone is unusual. Further, there is no developed M-1 district next to a residential zone in the city of Fairfield.

Jack Pflum, a civil engineer, testified as an expert for the city. He presented three alternative plans showing how the property could be developed to accommodate light industry without excessive cost. However, he acknowledged that none of the plans had ever been submitted to any developer. Further, these plans contemplated high-tech industrial park uses such as medical labs. M-1 zoning also includes such uses as warehousing, storage and trucking terminals, as well as manufacturing, processing, packing, and product assembly facilities. Pflum further acknowledged that he did not have any empirical evidence to suggest that a developer would prefer to do a high-tech sort of research facility as opposed to a meat processing plant on the property.

On February 6, 1991, the trial court dismissed Gerijo's complaint on the basis that the case was not ripe for judicial review. In an accompanying opinion, the trial court went on to state that if it had not dismissed the

complaint, it would have concluded that the zoning ordinance as applied to the property in question was unconstitutional. Gerijo appealed the trial court's February 6, 1991 decision. This court reversed the trial court's decision on the ripeness issue, but concluded that the trial court's ruling on the merits was premature. We remanded the case for further consideration. *Gerijo, Inc. v. Fairfield* (Dec. 2, 1991), Butler App. No. CA91-02-029, unreported. On remand, the trial court entered judgment in favor of Gerijo consistent with its previous opinion. This appeal followed.

The city presents two assignments of error for review as follows:

Assignment of Error No. 1:

> THE TRIAL COURT ERRED WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE DULY ELECTED COUNCIL OF THE CITY OF FAIRFIELD AS TO A REASONABLE ZONING FOR THE SUBJECT PROPERTY.

Assignment of Error No. 2:

> THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE COMPLAINT AND ENTER JUDGMENT IN FAVOR OF THE CITY OF FAIRFIELD AFTER APPELLEE WAS UNABLE TO DEMONSTRATE BEYOND FAIR DEBATE THAT THE ZONING OF APPELLEE'S PROPERTY WAS CLEARLY ARBITRARY AND UNREASONABLE.

Because these two assignments of error involve the same analysis, we will consider them together. We find they are not well-taken.

In order to invalidate a zoning regulation on constitutional grounds, the party attacking the regulation must demonstrate, beyond fair debate, that the zoning classification deprives that party of the economically viable use of its land without substantially advancing a legitimate interest in the health, safety, or welfare of the community. *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, 62, certiorari denied (1991), ___ U.S. ___, 111 S.Ct. 2854. The city contends that Gerijo was required to prove both prongs of this test in order to prove that the ordinance is unconstitutional. However, this court held otherwise in *Carney v. Warren Co. Bd. of Commrs.* (Aug. 26, 1991), Warren App. No. CA90-07-046, unreported, at 5-6, in which we stated that the party attacking the ordinance must demonstrate either that the zoning regulation denies it an economically feasible use of the property or that the regulation did not advance a legitimate interest. We agree with the trial court's statement that

> a zoning ordinance may indeed deprive a landowner of the economically viable use of his land if it in turn substantially advances a legitimate interest in the health, safety, or welfare of the community. For example, a zoning ordinance may be arbitrary, capricious and ill-founded and still leave a landowner with an economically viable use of his land which is still disparate from the "highest and best" use. Must a landowner sacrifice this highest and best use *vis-a-vis* a zoning which is arbitrary, capricious and ill-founded? We would hope not. If he must

> make this sacrifice, let us hope the zoning ordinance in turn, at least substantially advances a legitimate interest in the health, safety, or welfare of the community. Then perhaps, the sacrifice is not in vain.

Accordingly, we examine the trial court's conclusion that the zoning ordinance did not advance a legitimate interest in the health, safety, or welfare of the community. "A court will uphold a zoning ordinance in the face of a constitutional challenge, unless the parties challenging the ordinance can prove 'beyond fair debate' that a city's interest in restricting the use of that land were neither legitimate nor substantially advanced by such a restriction." *Columbia Oldsmobile, supra,* at 65. The validity of a zoning classification is deemed "fairly debatable" when reasonable minds may differ. However, a difference of expert opinion does not make the issue fairly debatable. Whether a matter is fairly debatable is determined by the basic physical facts and not on words or opinions. *Franchise Operations, Inc. v. North Olmstead* (1987), 35 Ohio App.3d 125, 127.

In reviewing the trial court's judgment, we are guided by the principle that judgments supported by competent, credible evidence going to all essential elements of the case must not be reversed as being against the manifest weight of the evidence. Every reasonable presumption must be made in favor of the judgment and findings of fact and, if the evidence is susceptible of more than one construction, we must give it that interpretation which is most favorable to sustaining the trial court's verdict and judgment. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

There is competent, credible evidence supporting the trial court's conclusion that Gerijo proved beyond fair debate that even though the city's goals may have been legitimate, the M-1 zoning of the property did not substantially advance those goals. The city claimed it planned to use the M-1 district as a buffer between residential and commercial zoning. However, we measure the constitutionality of the M-1 zoning "not by what * * * [the city] says, or by what it intends, but by what it *does*." *Id.* at 21, quoting *San Diego Gas & Elec. Co. v. San Diego* (1981), 450 U.S. 621, 653, 101 S.Ct. 1287, 1304 (Brennan, J., dissenting) (emphasis in original).

The city could point to no other instance where M-1 zoning was used as a buffer next to a residential zone and, indeed, even its expert acknowledged that such a use is unusual. The city presented three plans showing how some high-tech uses under the M-1 zoning may theoretically be used as a buffer, but it presented no compelling evidence that any of the uses under the plans could be realistically accomplished in the near future. This theoretical expert opinion does not make the issue "fairly debatable." *Franchise Operations, supra,* at 127.

The 1979 land use plan confined all industrial zones to the east side of Route 4. Suddenly, in the 1989 plan, the city designated this parcel of property west of Route 4 as industrial even though the surrounding area is residential. Supposedly, this change was to help the city accomplish its overall objective of establishing a 70/30 ratio between owner-occupied dwellings and rental dwellings. However, the evidence showed that the city had not adhered to that ratio and had allowed other multi-family residence projects to develop, supporting the conclusion

that its decision to deny Gerijo's petition for a zone change was arbitrary and capricious.

In sum, the record confirms the trial court's conclusions that the M-1 zoning, which included other more obnoxious uses besides the high-tech uses envisioned by the city, is completely inappropriate for this real estate and served no legitimate goal. Accordingly, the city's first and second assignments of error are overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

To all of which appellant, by its counsel, excepts.

JONES, P.J., KOEHLER and YOUNG, JJ., concur.

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

GERIJO, INC., Plaintiff	:	Case No. CV89-09-1271
vs.	:	(Judge Moser)
THE CITY OF FAIRFIELD, OHIO,	:	JUDGMENT ENTRY
Defendant.	:	(Filed June 2, 1992)

This matter came on for trial to the Court on December 17, 1990. The Court, having heard the evidence and arguments of counsel and having reviewed the exhibits and other documents admitted into evidence, rendered a judgment on February 6, 1991, which judgment was appealed. The matter has now been returned to the jurisdiction of this Court for judgment on the merits. Being advised in the premises, and the matter being fully heard, the court

ORDERS THAT the M-1 zoning of the subject real estate owned by Plaintiff on Route 4 in the City of Fairfield is unconstitutional as applied to the subject property, such zoning being unreasonable, arbitrary and confiscatory; not based upon the health, safety, morals and welfare of the City of Fairfield; and void and of no further force and effect, all for the reasons set forth in the Court's Opinion of January 8, 1991, incorporated herein by reference.

THE COURT FURTHER ORDERS THAT the City of Fairfield shall have a reasonable time period, which this Court determines to be ninety days, to rezone the subject

property to a reasonable and lawful classification. If Defendant fails to act within this time period, Plaintiff may proceed with the development proposed in the within cause of action without further application to defendant.

ENTER.

HAVE SEEN:

John H. Clemmons Attorney for Defendant	Moser, J.
Anthony G. Covatta 0018153 Attorney for Plaintiff	

The Supreme Court of Ohio

1992 TERM

To wit: May 13, 1992

Gerijo, Inc.,	:	
Appellant,	:	Case No. 92-203
v.	:	ENTRY
City of Fairfield, Ohio,	:	
Appellee.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Butler County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by City of Fairfield, Ohio.

(Court of Appeals No. CA9102029)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

GERIJO, INC., Plaintiff-Appellant/ Cross-Appellee, – vs – THE CITY OF FAIRFIELD Defendant-Appellee/ Cross-Appellant.	CASE NO. CA91-02-029 MEMORANDUM DECISION AND JUDGMENT ENTRY 12/2/91

Graydon, Head & Ritchey, Anthony G. Covatta and Harry J. Finke IV, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202, for plaintiff-appellant/cross-appellee

John H. Clemmons, Fairfield City Law Director, 1251 Nilles Road, Suite 18, Fairfield, Ohio 45014, for defendant-appellee/cross-appellant

Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon the briefs and oral arguments of counsel. Now, therefore, the assignment of error having been fully considered is passed upon in conformity with App. R. 12(A) as follows:

Plaintiff-appellant/cross-appellee, Gerijo, Inc., appeals a decision of the Butler County Court of Common Pleas dismissing its complaint against defendant-appellee/cross-appellant, city of Fairfield.

On September 8, 1989, Gerijo filed a complaint seeking a declaratory judgment that the zoning regulation of the city of Fairfield is unconstitutional. It alleged that the zoning regulation deprives Gerijo of the use of its property and that the city should not have denied its request for a zone change.

The record reveals that Gerijo is a corporation formed by the members of the Oliver family, who have owned the real property in question since the 1870's. Until 1986, the property was a working farm. However, since 1986, the land has been vacant and unused, and the Oliver family sought to sell it.

The parcel of land in question consists of roughly thirty-eight acres which sit approximately one thousand feet in back of the west side of Route 4 in Fairfield. It is currently zoned M-1, a low intensity industrial park zone. The real estate between this M-1 property and Route 4 is zoned C-3A, general business district, modified. The property is surrounded on three sides by various residential districts.

Over the years Gerijo received various offers to purchase the property for multi-family developments similar to those on surrounding pieces of land. However, this use would require the property to be rezoned R-3, multi-family residence district. No buyer interested in developing the property under the current light industrial zoning ever approached any representative of Gerijo. However, Gerijo did not list or attempt to sell the property under its existing industrial park zoning.

Richard Oliver testified that representatives of Gerijo had engaged in numerous conversations with representatives of Fairfield over an extended period of time regarding the zoning of the property, but that Fairfield "stonewalled all the way down the line." On April 24, 1989, Gerijo submitted to Fairfield a petition for a zone change, seeking to have the property rezoned from M-1 to R-3, which Fairfield subsequently denied. The city presented evidence that Gerijo only discussed zoning for R-3 multi-family which it considered to be the most profitable and refused to consider any other zoning. There was also evidence that Gerijo had received an offer of $40,000 per acre for the property which was not contingent on rezoning.

After hearing the evidence, the trial court dismissed Gerijo's complaint, concluding that the case was not ripe for judicial review. The court concluded that there had been no "final decision" regarding the rezoning of the property because "the city of Fairfield was in a compromising mood and still willing to discuss an alternative zoning to M-1." Gerijo filed a timely appeal and the city of Fairfield filed a cross-appeal.

In its direct appeal, Gerijo presents a single assignment of error for review which states that the trial court erred in dismissing its complaint on the grounds that the matter was not ripe for judicial determination. It argues that the proper authority had made a final decision denying the petition for a zone change and that the parties had

engaged in substantial but unsuccessful negotiations. We find this assignment of error to be well-taken.[1]

Both parties rely upon *Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12. In that case, the Ohio Supreme Court set forth the test to be applied in a declaratory judgment action for determining if an issue is ripe for judicial determination. A declaratory judgment action will not lie without the existence of an actual controversy which "exists when persons aver that their rights, status or other legal relations have been affected by an allegedly invalid ordinance." *Id.* at 16. The court stated:

> Accordingly, we hold that a prerequisite to determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of the zoning regulation to the specific property in question. Once the controversy is established, jurisdiction is successfully invoked and the issue of constitutionality becomes ripe for determination.

Id.

In this case, representatives of Gerijo testified that they had engaged in negotiations with the city of Fairfield over an extended period of time regarding the rezoning of the property and that the city of Fairfield had "stonewalled all the way down the line." Gerijo then filed a petition for a zone change which was denied for the

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[1] The exhibits presented at the hearing in the court below are not available for our review. However, because this case involves a jurisdictional issue, we are able to determine the merits of the assignment of error by reviewing the transcript of the docket and the transcript of the proceedings and find no need to review the exhibits themselves.

same reasons already discussed in previous negotiations. We think this evidence was sufficient to show that the city of Fairfield had taken a final position on rezoning the property.

Fairfield places much emphasis on the fact that Gerijo filed only one petition for a zone change. However, as the court in *Karches* stated, "[t]he necessity is to pinpoint the final position of the decision maker. Neither repeated applications and denials nor patently fruitless measures to obtain relief are required." *Id.* at 17. Further, the trial court placed much significance on the fact that, while Fairfield would not change the zoning to R-3, it did express some willingness to consider other zoning classifications. However, *Karches* requires a final decision concerning the application of the zoning regulation to a specific property in question. Finality is met when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 14-15, quoting *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985), 473 U.S. 172, 193, 105 S.Ct. 3108, 3120.

We think that Gerijo has demonstrated an actual concrete injury. Its evidence, if believed, demonstrated that the only reasonably viable economic use of the property is for multi-family residences. The property, due to its location and topography, is not particularly suited to industrial or commercial uses. Cases should be decided on the merits. Gerijo has shown that "no remedy was available which could have provided it with the relief requested." *Id.* at 18. Accordingly, Gerijo's sole assignment of error is sustained and the matter is remanded for determination of the case on the merits.

In its cross-appeal, Fairfield presents a single assignment of error for review which states that the trial court erred by denying its motion to dismiss the complaint on the merits at the conclusion of Gerijo's evidence and by refusing to grant judgment on the merits in favor of the city of Fairfield at the conclusion of the trial. However, because the trial court dismissed the case on jurisdictional grounds, there has been no ruling on the merits and the cross-appeal by the city is premature at this time. The trial court, in its decision, did make some statements about the merits of the case. However, since it had already dismissed the case on jurisdictional grounds, we hold these statements to be an advisory opinion which should not be relied upon as being the final judgment of the trial court. Instead, we are remanding the case to the trial court to make a final determination on the merits. Accordingly, Fairfield's assignment of error is overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and not inconsistent with this decision.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

Costs to be taxed in compliance with App. R. 24.

To all of which appellee/cross-appellant, by its counsel, excepts.

JONES, P.J., KOEHLER and YOUNG, JJ., concur.

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

GERIJO, INC., Plaintiff,	:	Case No. CV89 09 1271 (Judge Moser)
vs.	:	**ENTRY OF JUDGMENT**
THE CITY OF FAIRFIELD, OHIO, Defendant.	:	(Filed Feb. 6, 1991)

This matter came on for trial to the Court on December 17, 1990. The Court, having heard the evidence and the arguments of counsel and having considered the exhibits and other documents admitted into evidence, and having placed for record its opinion on January 8, 1991, which opinion is incorporated herein by reference, and being otherwise advised in the premises,

IT IS ORDERED THAT Plaintiff Gerijo, Inc.'s complaint is hereby dismissed in accordance with the opinion of this Court filed on January 8, 1991. Plaintiff to bear the costs.

ENTER.

/s/ John R. Moser
Moser, John R., Judge

John H. Clemmons, Attorney
for Defendant

Anthony G. Covatta
Harry J. Finke IV
Attorneys for Plaintiff

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Gerijo, Inc., Plaintiff, vs. The City of Fairfield, Ohio, Defendant.	:	CASE NO. CV89-09-1271 **OPINION** (Filed Jan. 8, 1991)

This matter came before the court for a hearing on the complaint of the plaintiff in respect to the defendant's refusal to re-zone the plaintiff's property from M-1 to R-3.

The complaint in this matter is somewhat couched in terms of an appeal, however, the complaint further asks for a declaratory judgment, finding that the current zoning is unconstitutional as it applies to this particular tract of land. The tract of land at issue herein is 38 acres more or less. We reject any contention of plaintiff to hear this matter as if on appeal for the reason that the refusal to re-zone property by a legislative body is not subject to an appeal under Chapter 2506 of the Ohio Revised Code. Nor can we find the *refusal* to re-zone unconstitutional. However, closely aligned to the refusal to re-zone this tract is the original legislation creating this zoning and therefore, we feel that the complaint, asking for a declaratory judgment, is properly directed at this original legislation and we will so consider it based upon the testimony.

For the first time, defendant in its post-trial memorandum raises the issue of jurisdiction of this court to hear this matter for the reason the Attorney General was not made a party defendant. We agree with plaintiff's analysis of this matter. The cases cited by defendant all involve an attack on the constitutionality of a city ordinance, the outcome of which might have a general effect on all similar ordinances throughout the State of Ohio. *Sub judice,* we only have an attack on the zoning ordinance as it applies to a *unique* piece of real estate, without possibly effecting any other zoning ordinance in the State of Ohio. Applying O.R.C. Section 2721.12 to our case serves no purpose, and hopefully, where the law has no purpose we can assume it has no application. See, O.R.C. 1.49(A); *Bank of Toledo vs. Toledo* (1853) 1 Ohio St. 62, 637; *In Re. Townsend* (1990) 51 Ohio St. 3d, 136, 138.

Additionally, the defendant, City of Fairfield, at the conclusion of plaintiff's case and then again at the conclusion of all of the testimony, moved for dismissal of plaintiff's complaint, based upon the "ripeness" doctrine as set forth in *Karches vs. City of Cincinnati* (1988) 33 Ohio St. 3d, 12.

Essentially, the City of Fairfield is contending that the plaintiff has only applied for re-zoning to classification R-3 and that before it can contest the constitutionality of the present zoning, it must show that the city has been unwilling to settle on an intermediate or less intensive, but still profitable, use for this property. In this respect, this court's observation can best be phrased by a quotation in an article by William B. Singer entitled *"Defending the Zoning Damage Suit"* at page seven, wherein Mr. Singer states:

> In such a case, clearly the property owner cannot, upon being denied a zone change, to the most profitable or "highest and best use" he desires, maintain an action for declaratory judgment and/or damages. He must first attempt to determine from the municipality what its maximum permitted use will be. On the other hand, the municipality cannot sit back and require the property owner to file repeated, expensive zone change applications in order to find out the maximum development the municipality will permit. There must be some degree of cooperation and openness between the property owner and the municipality for the ripeness test to be imposed and satisfied.

The ripeness doctrine is discussed at length by the Ohio Supreme Court in *Karches vs. Cincinnati* (1988) 38 Ohio St. 3d, 12, wherein the court discusses an attack upon the constitutionality of a zoning ordinance *via* an appeal, pursuant to R.C. Chapter 2506 or by declaratory judgment action pursuant to R.C. Chapter 2721. Then the court comments:

> A short example of the two actions will reveal this difference between them, including the significant difference that denial of a specific proposed purpose is pivotal to the ripeness determination in R.C. Chapter 2506 proceeding but not to the ripeness determination in a declaratory judgment action pursuant to R.C. Chapter 2721.

The Supreme Court in *Karches* then observed that at one time a property owner could not seek a declaratory

judgment action on the constitutionality of a zoning ordinance until he first sought a legislative change. This, of course, would support the ripeness doctrine.

Then, the Supreme Court in *Karches*, id. at 15 stated: "However, in *Driscoll vs. Austintown Assoc.* (1975) 42 Ohio St. 2d, 263, we dispelled any doubt that a declaratory judgment action could be used to challenge the constitutionality of a zoning ordinance." Such a pronouncement by the Supreme Court would certainly attenuate the ripeness doctrine as previously believed to be in existence, so evidently, the Supreme Court, at this point, decided to resolve the application of the ripeness doctrine as applied to declaratory judgment actions in zoning cases.

It is axiomatic that a declaratory judgment action will not lie without the existence of an actual controversy, so the issue becomes: When does an actual controversy exist? The Supreme Court in *Karches*, id. at 16 said:

> An actual controversy exists when persons aver that their rights, status or other legal relations have been affected by an allegedly invalid ordinance. (Citations omitted)
>
> Accordingly, we hold that a prerequisite to a determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of the zoning regulation to the specific property in question. Once a controversy is established, jurisdiction is successfully invoked and the issue of constitutionality becomes ripe for determination.[1]

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[1] We observe it was at this point the "ripeness doctrine" was adopted in the State of Ohio as a prerequisite to the filing of

We must now determine what the Supreme Court meant by "final decision", and receive some help by the Supreme Court itself at *Karches*, id. at 17:

> The purpose of the "final decision" requirement is to ensure that the court will know the nature and extent of permitted development before adjudicating the validity of the regulation that purports to limit it. (Citations omitted) . . . The necessity is to pinpoint the final position of the decision-maker. Neither repeated applications and denials nor patently fruitless measures to obtain relief are required.

While the Fairfield City Council certainly made a final decision in refusing to re-zone the property at issue to R-3, we must nevertheless view the term "final decision" in context with the "purpose" of requiring a final decision as outlined in *Karches* by the Supreme Court. Simply put, this court wants to know the *final position* of the City of Fairfield in relation to the re-zoning of the property so that we may know the "nature and extent of permitted development." (*Karches*, id. at 17) We heard testimony that there was but a single effort to re-zone this property from M-1 to R-3. Timothy Bachman, Planning Director of Fairfield, testified that the planning commission discussed and recommended a change of zoning to either PUD, C-3 or B-1 classification. Apparently, from the evidence, the plaintiffs were not willing to discuss an alternative to R-3 zoning. We can envision that while M-1

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a declaratory judgment action attacking the constitutionality of a zoning ordinance. " . . . an additional step the property-owner must climb to reach the courthouse door", *Singer*, id. at 8.

zoning may not be economically viable, one of the proposed alternative zoning classifications would be, albeit not the "highest and best" economical use.

So we must conclude that the City of Fairfield was in a compromising mood and still willing to discuss an alternative zoning to M-1.

Coming to this conclusion we then ask ourselves if we know "the nature and extent of permitted development" (*Karches*, id. at 17) of the 38-acre tract at issue. We ask this question because of the "necessity . . . to pinpoint the final position of the decision-maker". (*Karches*, id. at 17) Most certainly, the evidence leaves us wondering what is the *final* position of the decision-maker, the City of Fairfield?

At first blush, this court would enquire why is this "final position" so necessary. Simply put, the Supreme Court in *Karches*, id. at 16, said it is necessary to establish a controversy which in turn is a prerequisite to filing for declaratory judgment.

Sub judice, we determine there is as yet no controversy and therefore, this matter does not comport with the "ripeness doctrine", all of which requires this court to grant defendant's motion to dismiss.

We should have the good sense to stop here, but perhaps for the sake of judicial economy (during the appellate process), this court would like to further examine the record and law as if the "ripeness doctrine" was not at issue.

To do this, we must determine whether or not there is competent, credible evidence that the city ordinance

allows the plaintiff in this action to retain an economically viable use of its land and further, that the ordinance substantially advances a legitimate governmental interest in the health, safety or welfare of the community.

In making this determination, we recognize the plaintiff must demonstrate, beyond fair debate, that the zoning classification denies it the economically viable use of its land without substantially advancing a legitimate interest in the health, safety or welfare of the community. See, *Columbia Oldsmobile, Inc. vs. City of Montgomery* (1990) 56 Ohio St. 3d, 60, 62.

The record in this matter discloses that the 38-acre tract, zoned M-1, is located approximately 1000 feet off of Route 4. The real estate between this M-1 (industrial park district) and Route 4 is zoned C-3A (general business district, modified). The easterly side of the M-1 tract is zoned R-3 (multi-family residence district), while the southern end of the tract is zone R-4 (low density, multi-family residence district); the western end of the tract is zoned approximately two-thirds R-3, and the other one-third, C-3 (general business district). The overall area gives the appearance of residential districts in the shape of a horseshoe enveloping the M-1 district. There are two residential abutting streets to this M-1 district, Wedgewood Drive and Kohn Drive. The M-1 district is located on a long slope extending from State Route 4. The M-1 district itself has a fall in elevation of approximately 35 feet from north to the south and 20 feet from east to west. The visibility of this tract from Route 4 is limited. (Confirmed by a personal view of the premises by the court.)

Robert Garfield, who has a background in real estate brokerage business, testified that in his opinion the property was not suitable for light, industrial construction and was only suited for multiple housing. It was testified that due to the sloping grade, it would be expensive to put large buildings on a single level. However, Mr. Pflum on behalf of the City of Fairfield stated that the property could be utilized for light industrial by developing a "step plan", which would allow for construction at different levels. He further testified the property was suitable for light industrial and demonstrated at least three alternative plattings which would accommodate light industrial. Thus it would appear that light industrial is not highly improbable or practically impossible. *Valley Auto Lease and Chagrin Falls, Inc. vs. Auburn Twp. Board of Zoning* (1988) 38 Ohio St. 3d., 184, 186. However, for the near future, we would conclude that a sale for industrial purposes is at most speculative.

It was testified by a Mr. Hubbard from the Trammel Crow Residential Corporation that they would be interested in the property at $65,000 per acre, if zoned in the R-3 classification. There was testimony by Mr. Richard Oliver, one of the owners, that other offers were as high as $70,000, subject to proper re-zoning. Mr. Oliver further testified that the property has been listed with Coldwell-Banker since 1986 and that they have multiple offers on this property for residential purposes, but no offers as industrial property. The evidence also disclosed that the plaintiff did receive one unconditional offer in the sum of $40,000 per acre for the M-1 zoned property and the C-3A zoned property combined. The court would have been interested in knowing what part of the total purchase

price might have been fairly allocated to the C-3A zoned property. We can only assume from the evidence that the plaintiffs did have a bona fide offer of $40,000 an acre for the M-1 property, even though it did include other acreage. While the testimony disclosed there were no offers to purchase solely for the M-1 property, we also note from the evidence that the property was not listed for industrial purposes, nor was there any effort whatsoever made to secure an industrial buyer. In fact, the record is totally void of any evidence which suggests the efforts *to sell* the property as industrial. We simply have a number of offers to purchase in evidence. We also have no evidence that the present zoning would have an inefficient market value to generate profit over development.

This court recognizes there is considerable disparity between $65,000 an acre and $40,000 an acre. Does this disparity create an unconstitutional deprivation of the value of the plaintiff's property? In other words, is the plaintiff deprived of an economically viable use of his land? The mere fact this property is not zoned for its highest and best use does not make the zoning ordinance unconstitutional as a matter of law. Diminution of value, taken alone, is insufficient to invalidate existing zoning ordinances. See, *Central Motors Corp. vs. City of Pepper Pike* (1979) 13 O. O. 3d, 347. These plaintiffs are not entitled to the highest possible profit, but only to an economical viable use of the ground. It has been said that at some undefinable point, regulation of property shades into taking of property. Does the sale of the acreage at issue for $40,000 an acre constitute a "taking of property"? We think not. If indeed the property at issue was *wholly*

unsuited for light industrial, we might otherwise conclude; however, the testimony of Mr. Pflum quite clearly demonstrates that if there were an industrial buyer, the property could be developed. Therefore, we do conclude that the plaintiff could economically utilize this 30-acreage tract of ground, when there is an outstanding offer of $40,000 an acre, *vis-a-vis*, a potential $65,000 to $70,000 per acre. While this difference in value is disheartening, we do not believe that it is confiscatory.

Now having made this determination, the City of Fairfield could conclude the plaintiff could not prevail on its constitutional attack of the M-1 zoning because the test is two-prong and the plaintiff has already failed on the first prong. Defendant cites, *Columbia Oldsmobile, Inc. vs. City of Montgomery* (1990) 56 Ohio St. 3d, 60, as authority,

> . . . in order to invalidate a zoning regulation on constitutional grounds, the parties attacking it must demonstrate, beyond fair debate, that the zoning classification denies them the economically viable use of their land *without* substantially advancing a legitimate interest in the health, safety or welfare of the community. (Emphasis added).

While our defendant reads "without" to mean "and", this court reads it to mean "or".

We believe the Supreme Court is saying that a zoning ordinance may indeed deprive a landowner of the economically viable use of his land if it in turn substantially advances a legitimate interest in the health, safety or welfare of the community. For example, a zoning ordinance may be arbitrary, capricious and ill-founded and

still leave a landowner with an economically viable use of his land which is still disparate from the "highest and best" use. Must a landowner sacrifice this highest and best use *vis-a-vis* a zoning which is arbitrary, capricious and ill-founded? We would hope not. If he must make this sacrifice, let us hope the zoning ordinance in turn, at least substantially advances a legitimate interest in the health, safety or welfare of the community. Then perhaps, the sacrifice is not in vain.

Let us now return to *Columbia Oldsmobile,* id. at 62, for support of this court's position. The Supreme Court begins its analysis:

> This case presents the question of whether a trial court must uphold a municipal zoning ordinance when there is competent, credible evidence that the ordinance allows landowners to retain an economical, viable use of their land *and* that the ordinance substantially advances a legitimate governmental interest in the health, safety or welfare of the community. We answer this question in the affirmative. (Emphasis added)

The Supreme Court said "and", not "or". According to the City of Fairfield, if there was competent evidence that a landowner retained an economical, viable interest in the property, the case is over. The Supreme Court, however, states that before a zoning ordinance is declared constitutional it must not advance a legitimate governmental interest. When the Supreme Court proceeded to examine the facts in *Columbia Oldsmobile,* it found the ordinance left *Columbia Oldsmobile* with an economically feasible utilization of its property – so it examined the

second prong of the two-prong test, i.e., whether the zoning ordinance substantially advanced the City of Montgomery's legitimate interest in the health, safety or welfare of the community.

And, so it is *sub judice,* inasmuch as the court found that the zoning ordinance leaves the plaintiff with an economically feasible utilization of its property – we now determine if the zoning ordinance substantially advances the City of Fairfield's legitimate interest in health, safety or welfare of the community.

Witnesses for the City of Fairfield claim that the overall objective of the 1989 land-use plan for the City of Fairfield was to establish a 70/30 ratio between owner-occupied dwellings and rental dwellings. The land use plan itself in Section 2.2 states that the objective of the housing mix ratio should consist of seventy percent housing units from R-0 and R-1 single family zones and thirty percent housing units from R-2, R-3 and R-4, multifamily zones. We would find notwithstanding this worthy objective that the city may not arbitrarily and capriciously "zone out" multifamily units. It has been held:

> Even if the municipality has power to zone, however, it must exercise that power so as not to violate the state and federal constitutions. The specific question . . . is whether the ordinance does contravene the constitutional provisions above quoted. In other words, does the ordinance come within the police power?
>
> Under the police power, society may restrict the use of property without making compensation therefore, if the restriction be reasonably necessary for the preservation of the public

> health, morals or safety. This is so, because all property within the state is held subject to the implied condition that it will be so used as not to injure the equal right of others to use and benefit of their property.
>
> *Pritz vs. Messer,* 112 Ohio St. 628.

It was the testimony of Jack Pflum and Timothy Bachman, Fairfield Planning Director, that the M-1 zoning accomplished the overall objectives of the land-use plan for the City of Fairfield and was related to the health, welfare and safety of the community. It was also the testimony of Mr. Bachman that the M-1 zone was offered as a buffer to the commercial zone, lying immediately north thereof. This court finds such reasoning to belie the purpose of a buffer. The purpose of a buffer is to gradually zone property down so that there will not exist such a great zoning conflict between one zone classification and another. *Sub judice,* we find that the M-1 zone lies immediately adjacent to residential zoning. We think it axiomatic that all other zoning classifications, other than M-1 and M-2 would represent a far less severe contrast in adjacent zonings. Mr. Bachman offered the suggestion that there was a zoning conflict between residential and commercial because of an anticipated noise level existing in a commercial zone, which would generally disturb the peace and dignity of a residential zone. He cited a couple of examples where this has taken place within the City of Fairfield. However, the court observes there would be even a greater zoning conflict between an M-1 and residential zone. It is interesting to note that within the entire City of Fairfield, there is not a developed M-1 district next to a residential zone – not a single one. We do

acknowledge there are minimally-developed M-1 zones next to mobile home parks, which are confined to a C-3 classification.

It was also acknowledged by Mr. Bachman that the overall City of Fairfield development plan of 1979 confined industrial ground east of Route 4. The only industrial ground west of Route 4 is the M-1 district now under consideration, and one other M-1 district, located adjacent to the Wildwood Condominium area. Except for the M-1 tract, *sub judice* and the aforementioned other M-1 tract, all of the property east of Route 4 is either agriculture, business or residential. The inclusion of the M-1 parcel, *sub judice*, is an imposition on the neighborhood zoning and its very location is a deterrent to development because of the anticipated conflicts with the adjacent residents. We note that the M-1 district anticipates warehousing, storage and trucking terminals, as well as the manufacturing, compounding, processing, packing and assembling of products, all of which would be in strong contrast to the adjacent residential zoning. Of course the city as a setoff to this conflict in zoning states that any trucking terminal or warehousing must be buffeted by a 200-hundred foot strip, separating the M-1 district from any residential district. Of course, the end result of this is that any developer of this property, for warehousing and trucking terminals, must sacrifice approximately fourteen acres for a buffer zone, which means out of the purchase of 38 acres, only 24 would be usable. This would considerably enhance the cost per usable acre, and consequently, discourage the utilization of this M-1 district. This is a further indication that placing an M-1 zone in a basically residential area does not contribute to the health

and welfare of a community. Again, we repeat, there should be some transitional zoning between a residential district and a business district and M-1 does not represent such transitional zoning.

It has been held that:

> Zoning necessarily involves a consideration of the community as a whole and comprehensive view of its needs. An arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable . . . but the individual whose use of his property may be restricted is not the only person to be considered. See, *City of Aurora vs. Burns,* 149 N.E. 784.

While the above "was advanced for the purpose of justifying a zoning ordinance as being beneficial to the community as a whole, the principle is nevertheless applicable *sub judice* in considering the affect [sic] of this M-1 district on the neighboring R-3 and R-4. These latter districts are entitled to more than having warehouses, truck terminals and manufacturing processes located as their neighbors.

The authority to impose zoning regulations must conform to certain standards. Does the zoning ordinance substantially advance the City of Fairfield's legitimate interest in the health, safety or welfare of the community? We answer this question in the negative, and therefore, would (if we hadn't already dismissed this action) sustain the plaintiff's challenge to the constitutionality of the zoning ordinance as it affects the subject parcel.

If the court had reached this point in its decision without already having dismissed this action, we would now defer to the legislative authority to determine what zoning may be more compatible with the legitimate interests of the City of Fairfield. Such a determination is not a judicial one. *G.S.T. vs. City of Avon Lake* (1978) 59 Ohio App. 2d, 84.

Finally, and we quote from *Union Oil Co. of California vs. City of Worthington*, 62 Ohio St. 2d, 263, 266:

> It is entirely probable that any given property could be zoned in any one of several classifications and that any one of the several classifications would survive a constitutional attack based upon the ground that the classification was unreasonable, arbitrary and confiscatory and not based upon the health, safety, moral and welfare considerations. . . . The choice between various reasonable alternatives is best left to the legislative body rather than being usurped by the judiciary.

We would believe that a reasonable time period for the City of Fairfield to reconsider the zoning would be ninety days, that is, if this matter had not already been dismissed on page seven of this opinion.

/s/ John R. Moser
John R. Moser, Judge

cc: John Clemmons
Henry [sic] J. Finke, IV
Anthony J. Covatta

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

GERIJO, INC., c/o 1900 Fifth Third Center P.O. Box 6464 Cincinnati, Ohio 45201. Plaintiff, vs. THE CITY OF FAIRFIELD, OHIO, c/o City Solicitor 5350 Pleasant Avenue Fairfield, Ohio 45014 Defendant-Appellee.	:	Case No. CV89 09 1271 COMPLAINT (Filed Sept. 8, 1989)

1. Plaintiff Gerijo, Inc. ("Gerijo"), hereby appeals to the Court of Common Pleas, Butler County, Ohio, from the decision of the City Council of Defendant City of Fairfield, Ohio ("Fairfield"), on or about August 14, 1989, denying Gerijo's Petition For A Zone Change requesting that the zoning of the property described herein be changed from M-1 (Industrial Park District) to R-3 (Multi-family Residence District) for the specific purpose of developing a multi-unit family residence development. Gerijo seeks a reversal of that decision and declaratory relief, all as set forth more fully herein.

2. Gerijo holds fee simple title to property situated on Dixie Highway (Route 4) in the City of Fairfield, Butler County, Ohio, more particularly described as follows (the "Property"):

> Situated and being in Section 14, Town 2, Range 2, Butler County, Ohio, and being part of lot

#462 of the City of Fairfield, being further described as follows:

Being at the Southeast corner of Fair Oaks Plaza Subdivision, Section Two;

thence from said point of beginning, along the Easterly line of Fair Oaks Plaza Subdivision, Section Two, North 19°42'-34" East, 905.00 feet;

thence South 74°21'-56" East, 1734.23 feet to the Northwest corner of lot #9526 of Wedgewood Estates, Section Two;

thence along the Westerly line of Wedgewood Estates, South 1°17'-56" West, 783.20 feet;

thence South 60°59'-55" West, 161.81 feet;

thence North 75°15'-16" West, 1726.52 feet;

thence North 75°40'-10" West, 151.05 feet to the point of beginning; containing 38.032 acres of land and being subject to all easements and rights-of-way of record.

3. The Property is currently zoned M-1 (Industrial Park District) pursuant to Fairfield's Zoning Code.

4. The current M-1 zoning does not represent the highest and best use of the Property and it is arbitrary, confiscatory, unreasonable, and not based on the public health, safety, morale and general welfare.

5. On or about April 24, 1989, (check) Gerijo filed a Petition For A Zone Change, in accordance with applicable law, seeking a change in zoning for the Property from M-1 to R-3 (Multi-family Residence District), for the specific purpose of developing a multi-unit family residence

development. A copy of the Petition is attached hereto as Exhibit A.

6. A zoning classification of R-3 represents the highest and best use of the Property.

7. On or about August 14, 1989, Fairfield's City Council denied Gerijo's Petition.

8. In making its decision, Fairfield relied upon irrelevant, extraneous and non-statutory considerations, and the decision was arbitrary, confiscatory, unreasonable, and not based on the public health, safety, morale and general welfare.

9. Fairfield's decision unjustly and illegally deprives Gerijo of the highest and best use of its property and deprives Gerijo of the economic benefit which it could derive from the Property by developing it as set forth in its Petition.

10. As a result of the foregoing considerations, the Zoning Regulations of Fairfield, as constituted and as applied to Gerijo's Property, deprive Gerijo of its rights under Article I, §§1 and 19 of the Ohio Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution, and are, therefore, void and of no force and effect.

WHEREFORE, Plaintiff Gerijo, Inc., demands a judgment against Defendant City of Fairfield:

1. Declaring that the decision of the City Council of the City of Fairfield complained of herein is unsupported by substantial, reliable and probative evidence and is unconstitutional, arbitrary, confiscatory, unreasonable

and not based on the public health, safety, morale and general welfare;

2. Declaring that the Zoning Regulations of the City of Fairfield are unconstitutional, void and ineffective as a basis for denying Gerijo's Petition For A Zoning Change described herein;

3. Reversing the decision of the City of Fairfield and directing that the City of Fairfield grant Gerijo's Petition For A Zone Change as requested;

4. Granting Gerijo its costs and such other relief as the Court deems appropriate.

OF COUNSEL:

Harry J. Finke IV and
GRAYDON, HEAD &
RITCHEY
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6464

Anthony G. Covatta
Trial Attorney for Plaintiff
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6464

Supreme Court, U.S.
FILED
JAN 10 1995
OFFICE OF THE CLERK

No. 94-1052

In The

Supreme Court of the United States

October Term, 1994

GERIJO, INC.,

Petitioner,

vs.

CITY OF FAIRFIELD, OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

TIMOTHY M. BURKE
Counsel of Record
GARY E. POWELL
MANLEY, BURKE, FISCHER, LIPTON & COOK
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

JOHN H. CLEMMONS
Fairfield City Law Director
MILLIKIN & FITTON
18 Clock Tower Place
1251 Nilles Road
Fairfield, Ohio 45014
Telephone: (513) 829-6700

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. STATEMENT OF THE CASE

This court is asked by petitioner to review a decision of the Ohio Supreme Court which sustained the City of Fairfield's zoning on petitioner's property. The State Supreme Court's decision recognized that petitioner admitted the zoning did not deprive it of the reasonable economic use of the property. A majority of the Ohio Supreme Court also found that Fairfield's zoning advanced a legitimate governmental interest – maintaining a balance between multi-family and single-family units in the City. *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 230, 638 N.E.2d 533 (1994).

This case reached the Ohio Supreme Court because the Twelfth District Court of Appeals certified the following issue for review: "Whether, in order to prove that the zoning ordinance is unconstitutional, the plaintiff must prove the two-pronged test set forth in *Columbia Oldsmobile* [*v. Montgomery*, 56 Ohio St.3d 60, 564 N.E.2d 455 (1990)] in the conjunctive or disjunctive." *See* Entry Granting Motion to Certify at App. 20.[1] The first part of the *Columbia Oldsmobile* test required the Court to determine whether the zoning ordinance allowed the property owner an economically feasible utilization of its property. In the second part of the test, the Court reviewed whether the ordinance permissibly advanced a legitimate interest of the city. *Id.*, 56 Ohio St.3d at 62.

Petitioner would have this court review Ohio's determination that for a property owner to successfully challenge zoning the owner must prove both that the zoning deprives the owner of the reasonable economic use of its property and that the zoning fails to advance a legitimate

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[1] All references to appendices relate to the appendices included in the Petition For Writ Of Certiorari.

governmental interest. What petitioner asks the court is essentially an academic question, for here petitioner failed to prove either leg of the two-pronged test. Thus, whether the test is conjunctive or disjunctive, petitioner fails to overturn the City's zoning.

II. SUMMARY OF ARGUMENT

The Ohio Supreme Court held that "[a] party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 638 N.E.2d 533 (1994)(syllabus). Petitioner contends that this is a misstatement of the law. Even if petitioner is correct, the Ohio Supreme Court found that petitioner failed to prove *either* of the two elements, and, therefore, upheld the zoning. *Id.*, 70 Ohio St.3d at 230-31.

III. ARGUMENT

Fairfield, a rapidly expanding neighbor of Cincinnati, had, years prior to this controversy, adopted a policy designated to prevent the City from being overrun by apartment development. It articulated a goal to maintain a balance of 70% to 30% between single and multi-family uses. Granting petitioners' rezoning would have resulted in the construction of 532 additional apartments, 3% of the total dwelling units in Fairfield, pushing the city further away from its desired balance. Thus, Fairfield rejected the zone change sought by petitioner, leaving the property zoned for light industrial uses, a zoning which

both provided controls over obnoxious uses and preserved for the owner a viable economic use.[2]

Petitioner's argument is twofold: (1) the Ohio Supreme Court erred when it stated the applicable standard for reviewing the validity of a zoning ordinance; and (2) the Ohio Supreme Court erred when it found that the zoning ordinance, as applied to petitioner's property, advanced a legitimate governmental interest of the City. The arguments can be addressed together.

The Ohio Supreme Court stated in its syllabus that "[a] party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 638 N.E.2d 533 (1994)(syllabus). Petitioner contends that this standard misstates United States Supreme Court precedents which require a party challenging a zoning ordinance to establish either that the regulation denies an owner economically viable use of his land or that the regulation does not substantially advance legitimate state interests. *See* Petition at 14.

Petitioner failed to establish either element of that standard. Petitioner did not dispute that it retained viable economic uses of the property as zoned. *Id.*, 70 Ohio St.3d at 228. As to the second element, the Ohio Supreme Court found that the Fairfield Zoning Ordinance, as applied to

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[2] Inexplicably, the Ohio Supreme Court stated that Fairfield changed the zoning on the subject property to M-1, Industrial Park District, in 1989. *See, Gerijo, Inc. v. Fairfield, supra*, 70 Ohio St.3d at 223-24. That statement is wrong. There are no facts anywhere in the record to justify that statement. In fact, the subject property has been zoned M-1 for over 20 years.

petitioner's property, substantially advanced a legitimate governmental interest and was not arbitrary. *Id.*, 70 Ohio St.3d at 230.

In its review, the Ohio Supreme Court restated the time-honored standard that "[w]hen reviewing the legitimacy of zoning ordinances, this court has repeatedly recognized a strong presumption in favor of the validity of the enactment . . . " and that "[t]he party challenging an ordinance bears, at all stages of the proceedings, the burden of demonstrating that the provision is unconstitutional. . . . " *Id.*, 70 Ohio St.3d at 226. (citations omitted.) The Court also emphasized that "[t]he judgment of the judiciary is not to be substituted for that of the legislature when an issue is fairly debatable so that reasonable minds may differ." *Id.*, 70 Ohio St.3d at 229. (*Citing, inter alia, Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926)).

Petitioner criticizes the Ohio Supreme Court for failing to give proper deference to the factual findings of the trial court. *See* Petition at 17-18. The Ohio Supreme Court reversed because that court failed to give proper deference to Fairfield's legislative decision. Fairfield presented credible evidence to support the application of the zoning classification to the subject property. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d at 229.

> "Fairfield's efforts in this case represent a sincere attempt by the local governing body to respond to very specific land use problems that arose as the municipality expanded. Use of the light industrial classification as a transitional zone was specifically tailored to meet the needs of areas surrounding Gerijo's property. We will not substitute our opinion for the local zoning expertise of the legislative entity when the evidence presented clearly contradicts a finding that the M-1 zoning was arbitrary or that it

failed to substantially advance a legitimate governmental interest."

Id., 70 Ohio St.3d at 230.

IV. CONCLUSION

Fairfield has carefully articulated a goal of maintaining a balanced housing stock. The zoning on petitioner's property furthers that goal while ensuring the owner a reasonable economic use. Thus, no justification exists for overturning that zoning or the Ohio Supreme Court's decision which sustained it, and neither the ends of justice nor judicial economy would be served by granting the Petition. The Petition should be denied.

Respectfully submitted,

TIMOTHY M. BURKE
Counsel of Record
GARY E. POWELL
MANLEY, BURKE, FISCHER,
LIPTON & COOK
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

JOHN H. CLEMMONS
Fairfield City Law Director
MILLIKIN & FITTON
18 Clock Tower Place
1251 Nilles Road
Fairfield, Ohio 45014
Telephone: (513) 829-6700

Attorneys for Respondent
City of Fairfield, Ohio

Of Counsel:

MANLEY, BURKE, FISCHER, LIPTON & COOK
225 West Court Street
Cincinnati, Ohio 45202